JD(NY)–09–09
Bronx, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

RISING DEVELOPMENT BPS, LLC.

and Case No. 2-CA-38651

LOCAL 890, LIFE

Nicole Buffalano, Esq. and
Leah Z Jaffee, Esq., of New York,
NY, for the General Counsel.
Joseph Labuda, Esq., (Milman Labuda
Law Group PLLC), Lake Success, NY,
for the Respondent.

DECISION

STEVEN FISH, Administrative Law Judge: Pursuant to charges and amended charges filed by Local 890 LIFE, herein called the Union, the Director for Region 2, issued a Complaint and Notice of Hearing on May 15, 2008,[1] alleging that Rising Development BPS, LLC (herein called Respondent or the Employer), violated Sections 8(a) (1), (3) and (4) of the Act by suspending Fernando Negron (herein called Negron) and reducing his wages, because he testified at a Board hearing.

The trial with respect to the allegations set forth above, was held before me in New York, N.Y. on July 16, 17 and 21. At the opening of the trial, General Counsel moved to withdraw paragraph 6 of the complaint, (alleging an unlawful reduction of Negron's wages), and to make some minor amendments to reflect the correct address of Respondent and the correct name of some of Respondent's supervisors. I granted these motions as well as Respondent's motion to amend its answer to admit the supervisory status of Hanna Hanna (Hanna) and Ramona Ramos ((Ramos).

Briefs have been submitted and have been considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation with an office at 3261 Broadway, New York, N.Y., and is engaged in the ownership and operation of residential apartment buildings at 922-926, 932, 940, and 949-950 Bronx Parkway South and 2137 Vyse Avenue, Bronx, New York. During the past year, Respondent derived gross revenues in excess of $500,000 and purchased and

[1] All dates referred to are in 2008, unless otherwise indicated.

received at its facilities goods and materials valued in excess of $5,000 directly from points located outside the state of New York.

Respondent admits, and I find so that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent also admits, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. SUPERVISORY STATUS OF NEGRON

A. FACTS

Respondent raised the issue of Negron's supervisory status in Case No. 2-RC-23250. A hearing was held on February 11, with respect to that issue, as well as unit issues raised by Respondent. At the hearing testimony was adduced from Hanna and Negron concerning Negron's status. On February 24, the Director issued a Decision and Direction of Election finding *inter alia*, that Respondent had not established that Negron was a supervisor under Section 2(11) of the Act. The record does not reflect whether or not Respondent requested review of the Director's decision.

The record does reflect that an election was held and that the Union was certified on April 4 as the collective bargaining representative of Respondent's employees in a unit of all full time and regular part time porters, handymen and superintendents.

In this proceeding, Respondent again presented Hanna as a witness to testify concerning Negron's status, as well as Ramos, who didn't testify in the R case proceeding. Negron also testified in this proceeding concerning his status. The testimony adduced in this trial on this issue was essentially the same as that presented in the representation hearing. No evidence was presented in this trial that Negron's duties or responsibilities had changed in any way since the earlier hearing.

The five buildings operated by Respondent are all located in and around Bronx Park South in the Bronx, N.Y. They are considered an apartment complex consisting of 106 apartments, with approximately 800 tenants.

The buildings are supervised by Hanna, the managing agent and by Ramos, the office manager.[2] Additionally Respondent employed seven employees to clean and maintain these buildings. They included three full-time porters, one part-time porter, two handymen and one superintendent, which was Negron as of February 2008.

The porters and handymen are hourly employees who earn between $8.50 and $11.00 per hour respectively. Negron earned $600 per week, plus a free apartment. In exchange for this apartment, Negron was "on call," 24 hours a day for emergencies.

Negron was working for Respondent for approximately five months. His primary responsibilities as superintendent was maintaining the five buildings by inspecting them

[2] Respondent has admitted that Hanna and Ramos are supervisors under Section 2(11) of the Act.

for cleanliness and needed repairs, ensuring that the boilers were functioning and making necessary repairs within the apartments.

Negron also purchases items on behalf of Respondent at the hardware store, but usually in consultation with Ramos and Hanna.

Work orders for all employees including Negron, are prepared and distributed by Ramos. Each morning, the employees meet in Ramos' office, where she distributes these work orders to the employees. The porters generally perform the same work every day, of cleaning the buildings and the outside and taking out the garbage. The porters are assigned to specific buildings, which do not change, unless one of them is out of work.

Although Hanna testified that Negron's responsibilities included oversight of the other employees, and "making sure that they are doing their jobs properly," very little specific evidence, detailing how and in what circumstances, Negron performed these functions was adduced.

In that regard Ramos testified that she observed Negron "a couple of times" telling porters to remove garbage from the basement or "bring something that was not picked up or something like that."

Hanna also provided testimony concerning an incident involving a "walk through" with Negron and porter Cecilio Rivera, at a building that Rivera was assigned to service. Hanna noticed that the building was not clean and instructed Rivera to take care of problems that Hanna pointed out were not performed properly.

Hanna then spoke to Negron privately. Hanna told Negron that "you have to make sure that the porters are doing their job. It shouldn't be me that comes and tells them what to do. There is a chain of command, just like my boss will talk to me about you slacking off. Because he's not going to deal with why you're not doing your job. He's going to deal with me." Hanna testified that he considered these comments to Negron to be a "verbal warning." However, nothing concerning this incident was placed in Negron's personnel file, and Negron suffered no adverse consequences, as a result of Rivera or any other employee not doing their job.

Hanna also offered testimony concerning Negron's alleged role in the discharge of several employees. Hanna testified that Negron recommended the termination of Cecilio Rivera. The record is undisputed that Negron made several complaints to both Ramos and Hanna that Rivera was not doing his job properly and that both Negron and Ramos spoke to Rivera about his performance. However, at that point Negron had not recommended that Respondent take any disciplinary action against Rivera. Hanna himself also spoke to Rivera about his slacking off and not doing his work properly.

Finally, at some point, Negron reported to Hanna, that several bags of salt, entrusted to Rivera has gone missing, and that he (Negron) suspected that Rivera had

stolen the bags of salt to sell to some unknown individuals. According to Hanna, Negron recommended to him at that time, that Rivera be terminated.[3]

Hanna then spoke to Ramos about the situation, and again discussed it with Negron. Negron informed Hanna that some tenants had told him that Rivera was "selling the salt." Hanna also had several conversations with Rivera about the salt. Rivera had no satisfactory explanation for what happened to the salt. Hanna testified that since Rivera had been entrusted with the salt, and had no explanation as to how it disappeared, that he (Hanna) made the decision that Rivera be terminated.

Maurice Riera was another porter employed by Respondent. Negron reported to Hanna that he (Negron) was dissatisfied with Maurice Riera's work, in that his buildings were not clean and he was always late. Hanna also received similar reports from Damaras the predecessor of Ramos as property manager. According to Hanna at a meeting attended by Damaras, Hanna and Negron, Negron said that Maurice is not doing his job and should be replaced.

Hanna testified further that he himself witnessed problems with Maurice's failure to clean his building properly on one of two occasions.

Hanna also testified that at some point, he decided to terminate Maurice, although he was not specific as to precisely when he made such a decision vis-a-vis this alleged "recommendation" by Negron.

Negron denied that he ever recommended the termination of any employee, although he furnished no specific testimony concerning his involvement with Maurice Riera.

Further in the prior representation proceeding, Hanna did not testify that Negron had recommended termination of Maurice Riera, or that he had any say in Maurice's discharge. Moreover, Hanna specifically testified therein that Cecilio Rivera and Damaras were only two employees where Negron recommended their discharge. Interestingly, Hanna did provide some testimony about Maurice, in the representation proceeding, but only to the extent that at a time before Negron became superintendent, he (Hanna) issued written warnings to Maurice several times and finally Maurice was dismissed. Hanna testified that Damaras had reported to him that Maurice was late, missed days and talked back to Damaras. Hanna also had conversations with Maurice about these incidents.

Ramos also provided testimony that on several occasions, Negron complained to her that he (Negron) had spoken to Riera about not cleaning the building properly, slacking off on the job, and not being where he was supposed to be at. According to Ramos, Negron told Ramos about these conversations, and that after that "there were no more incidents."

[3] Negron denied making such a recommendation, although he admitted telling Hanna that he believed that Rivera had stolen the salt.

Finally, Hanna conceded that his practice is to conduct his own investigation into any disciplinary issues before disciplining an employee.

As noted above, Hanna also testified that Negron had a hand in Respondent's decision to terminate Damaras. According to Hanna, Negron, shortly after he began his employment with Respondent, began complaining to him, (Hanna) about how Damaras was "running the properties." Negron told Hanna that Damaras was not doing the job the way it should be done, it was very hard to work with her and "we're all going crazy here." Negron allegedly added that it was hard to do his job, while he is constantly called from one job to the other before finishing the first job that he received. Hanna admitted that Negron never requested that Respondent terminate Damaras, but asserts that partially as a result of Negron's "expression of dissatisfaction" with Damaras, he decided to fire Damaras. In this regard, Hanna admitted that Negron's predecessor as superintendent had also complained about Damaras, asserting that she was emotional and difficult to work with. Hanna added that he spoke to Damaras at the time, and she seemed fine to him. Finally, after Negron made his complaints, Hanna asserts that he decided to terminate Damaras.

Shortly after Negron was hired, he began complaining to Damaras, and Hanna about the amount of work that he had to do, and the fact that one handyman was not sufficient. In fact Negron also suggested that Respondent hire an additional live-in superintendent. Negron continued to make those complaints to Ramos, after she replaced Damaras, as well as to Hanna. Ramos agreed with Negron's recommendation and also urged Hanna to hire an additional handyman. However, according to Hanna, his boss, [4] didn't want to increase the payroll, so no one was hired. Finally, in late January of 2008, Hanna received the permission from Sprayregen to hire an additional handyman. Negron recommended two individuals for the position. These individuals were interviewed by Respondent, but were not hired. The replacement handyman who was hired was interviewed by Respondent's officials and selected, without any input from Negron.

B. ANALYSIS

As I have noted above, the Director has found in the representation case that Respondent had not established that Negron was a supervisor under Section 2(11) of the Act. Section 102.67(f) of the Board's rules and regulations, preclude the relitigation in related unfair labor practice proceedings of any issues which have been raised in the representation proceeding. However, that section applies primarily to attempts to relitigate issues for 8(a)(5) purposes and testing of certifications. Where, as here, the issue of supervisory status is in a different context, whether the individual is a supervisor and not protected under the Act, it is not considered to be "related" under 102.67 of the Rules and may be relitigated. *Dole Fresh Vegetables, Inc*., 339 NLRB 785 (2003); *Brusco Tug and Barge Co*., 330 NLRB 1188, 1189 (2000); *Serv-U-Stores Inc.,* 234 NLRB 1143, 1144 (1978). However, the Board may accord "persuasive

[4] Hanna's boss is Nick Sprayregen, the President of Respondent.

relevance," a kind of "administrative comity" to the prior representation case findings, subject to reconsideration and to any additional evidence addressed in the unfair labor practice case. *Dole Fresh*, supra; *Brusco*, supra, *Serv-U-Store*, supra.

I therefore find it appropriate, and I accord such persuasive relevance and administrative comity to the Director's decision on Negron's status. I have reviewed the Director's decision, the record in the representation case and the additional evidence adduced in this proceeding. I conclude that none of the evidence presented by Respondent, warrant overruling the Director's conclusion that Respondent has failed to meet its burden of establishing that Negron was a supervisor under the standards of Section 2(11) of the Act.

While Respondent is correct that it needs only to establish that Negron has the authority to engage in one of the 12 listed supervisory functions in Section 2(11) of the Act, as long as the authority exercised with independent judgment, *Allied Mechanical, Inc.,* 343 NLRB 631, 641 (2004), *Franklin Home Health Agency*, 337 NLRB 826, 829 (2002), it is not correct that it has established here that Negron has such authority.

Respondent contends in this regard, that Negron effectively recommended hiring, firing and discipline of employees, and assigned and directed works of employees. Respondent further argues that Negron exercised independent judgment in performing these supervisory functions. I cannot agree.

Turning to the latter two indicia, the Board defines "assign" under "Section 2(11) of the Act to mean the act of "designating an employee to a place such as a location, department, or wing, appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee*," Oakwood Healthcare, Inc*., 348 NLRB 686, 689 (2006). The Board further explained that choosing the order in which the employee will perform discrete tasks within an assignment would not be indicative of exercising the authority to "assign" work.

Respondent has adduced no evidence that Negron "assigned" work under the above definition. Negron on a few occasions told porters to perform various cleaning tasks, such as dumping trash outside the building and removing graffiti from the wall, these tasks are part of their overall duties, which is to maintain the cleanliness of the buildings to which they are assigned. The work assignments are distributed to employees by Ramos. Although Negron's instructing porters to perform a particular task, such as to take out garbage and to clean graffiti could be construed as "reallocating" work, such switching of tasks does not implicate the authority to assign, since it does not constitute the designation of significant overall duties to employees. *Croft Metals, Inc*., 348 NLRB 717, 722; Oakwood Healthcare, supra.

With respect to the authority to direct, it is necessary for Respondent to establish that Negron decided what job should be undertaken next or who shall do it, and carried out such activity with independent judgment.

It is also necessary to prove that Negron is held accountable for the performance of the employees allegedly under his supervision. Respondent must establish all of

these elements in order to prove supervisory status of Negron. *CGLM, Inc.,* 350 NLRB 974, 983 (2007); *Golden Crest Health Center,* 348 NLRB 727, 730 (2006).

Here, the evidence presented by Respondent falls far short of meeting its burden of proof in this regard. While Respondent did show that Negron directed porters to take out the garbage and to clean up graffiti, these instructions are routine and do not involve the exercise of independent judgment. The porters know what their jobs are, and they perform repetitive tasks at the same locations every day. Respondent admitted no evidence regarding any factors weighed or balanced by Negron, in making decisions in directing employees. *Croft Metals, Inc*., 348 NLRB 717, 772 (2002*); Allstyle Apparel* 351 NLRB No. 42 *ALJD slip op* at 20, *Cassis Management Corp*., 323 NLRB 456, 457-458 (1997). (Assignments and direction by superintendent to handyman and porters routine and did not involve independent judgment.)

Further, Respondent has also failed to demonstrate the requisite degree of accountability, to prove supervisory status. In that regard Respondent must establish "actual accountability" to prove responsible direction. Respondent adduced no evidence that Negron would have experienced any material consequences to his terms or conditions of employment, ether positive or negative, as a result of his performance in directing employees. *Cassis* supra at 484; *Golden Crest*, supra.

In this regard, Respondent relies on the alleged "verbal warning," of Hanna to Negron, where Hanna criticized Negron for Rivera's failure to keep a building clean and told Negron that he "needs to make sure that the porters are doing their jobs." However, whether or not his comment can be construed as a "verbal warning" or not. There is no indication in that conversation, that Negron's terms and conditions of employment would or could be adversely affected by the failure of Rivera or any other employee to do their job properly. Nothing was placed in Negron's personnel file about the incident, and he suffered no adverse consequences from Rivera's failure to keep the building clean. Further, Maurice Riera was terminated for poor work performance, and there is no evidence that Negron was held accountable for Riera's poor work, or his failure to improve his work performance.

Therefore I conclude that Respondent failed to establish that Negron responsibly directed the work of its employees.

Respondent also asserts that Negron effectively recommended the hiring of a handyman. Hanna testified that he agreed to hire an additional handyman based on Negron's recommendation to do so. However, the record establishes that since he began his employment in November of 2007, Negron began complaining to Hanna, as well as to Damaras and Ramos, that he had too much work to do, and that Respondent needed to hire an additional person. Initially Negron requested that Respondent hire an additional superintendent, but eventually changed his request to an additional handyman. Ramos agreed with Negron's request and also urged Hanna to hire an additional handyman. Initially, Sprayregen refused to agree to any new hires because he did not wish to increase the payroll. Finally, in late January, Sprayregen agreed, and Respondent hired an additional handyman.

While Negron did request that Respondent hire an additional handyman, it seems to me that this suggestion is more of a complaint of an employee that he has too much work to do, and he needs help, rather than a management decision to increase staff based on production needs.

More significantly, there is insufficient evidence, that the new handyman was hired as a "direct consequence" of Negron's recommendations. Thus, in addition to Negron requesting an additional handyman, Ramos also urged such a hire, and it appears that Hanna himself had so recommended, but Sprayregen rejected the recommendation because he did not want to increase payroll. Thus Respondent has not proven that Negron's recommendation to hire carried greater weight than that of Ramos or Hanna. *The Door,* 297 NLRB 601, 602 (1990); *The Mower Lumber Co*., 276 NLRB 706, fn. 2 (1985).

Further when Respondent actually hired a handyman, although it interviewed two individuals recommended by Negron, it did not hire either one of them, and Negron had no input in the interviewing or hiring the handyman selected by Respondent for hire.

Accordingly, Respondent has not established that Negron had the authority to effectively recommend hiring.

Respondent also contends that Negron had the authority to effectively recommend the discharge of employees. I disagree. Respondent relies on Negron's role in the terminations of Rivera, Damaras and Riera. Although there is some dispute between the testimony of Hanna and Negron in these areas, particularly as to whether Negron made specific recommendation to terminate these individuals, I need not resolve them, for purposes of this decision, since even crediting Hanna's testimony,[5] Respondent has not established that Negron possessed the authority to recommend discipline or discharge.

It is well settled that the authority to recommend discipline and discharge generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed. *Allstyle Apparel,* supra, ALJD slip op. at 12, *Los Angeles Water & Power, Employees Assn*., 340 NLRB 1232, 1234 (2003); *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982); *Brown & Root Inc*., 314 NLRB 19, 23 (1994); *Hawaiian Telephone Co*., 186 NLRB 1, 2 (1970).

Here Hanna conceded that he makes his own independent investigations before discharging employees. Further the record establishes that he did so, in the case of the

[5] If it was necessary to make a credibility resolution with respect to employee Riera, I would not credit Hanna, that Negron recommended that Respondent terminate Riera. Although Hanna so testified in this proceeding, he did not mention anything about Negron's role in the termination of Riera, in his testimony in the representation case. Further, in the representation proceeding, Hanna specifically testified that there were only two instances where Negron recommended discharge, Cecilio Rivera and Damaras.

three employees involved.

In the case of Cecilio Rivera, complaints were made about Rivera's work from both Negron and Ramos, who both spoke to Rivera about his performance. Negron made no recommendation to terminate Rivera until Negron reported that he believed that Rivera had stolen some salt. Hanna discussed the situation with Ramos, and spoke to Rivera about it personally, to see if Rivera had a satisfactory explanation for the missing salt. Since Rivera did not provide such an explanation as to what happened to the salt entrusted to him, Hanna terminated him. Thus Hanna clearly conducted his own independent investigation of Rivera's conduct, and terminated him after also consulting with Ramos.

As for Riera, Hanna received complaints from both Negron and Damaras about Riera's poor work, and Hanna himself witnessed problems with Riera's failure to clean buildings properly. Further, Hanna provided no specific testimony as to precisely when vis-a-vis, Negron's alleged recommendation to terminate Riera, he made his decision to do so. Moreover, Respondent provided no documentary evidence concerning this termination.

I conclude therefore, that even crediting Hanna's testimony, Respondent terminated Riera, after an independent investigation by Hanna. Further, inasmuch as Damaras also complained about Riera's work performance, and Hanna himself noticed Rivera's poor work, Respondent has not shown that Negron's alleged recommendation carried greater weight than these other factors, and it has not established that the discharge of Rivera was "a direct consequence" of Negron's recommendation. *The Door*, supra.

As for Damaras, I note initially that she was an admitted supervisor, and it is questionable whether a "recommendation" to terminate a supervisor is encompassed by Section 2(11) of the Act. Thus, it could reasonably be argued that Negron's complaints about Damaras are akin) to complaints by an employee about not being able to work with his supervisor. I do not believe that such complaints establish supervisory status of the complaining employee. Moreover, Hanna admits that Negron never made a specific recommendation to terminate Damaras. Although Hanna did testify that he relied in part, on Negron's complaints about Damaras, before deciding to terminate her; he admits that he also received complaints from the prior superintendent (Negron's predecessor) about Damaras.

Thus, since Negron concededly made no recommendations to terminate Damaras, his complaints about her are considered merely reportorial, and are not indicative of supervisory authority. *Williamette Industries*, 336 NLRB 743, 749 (2001); *Ohio Masonic Home*, 245 NLRB 340 (1989). Finally, once again, Respondent has failed to demonstrate that Damaras was terminated as a "direct consequence" of Negron's complaints, since the prior superintendent had made similar complaints to him about her. *The Door*, supra.

Accordingly, I conclude that Respondent has failed to demonstrate that Negron possessed the authority to effectively recommend discipline or termination. Having

rejected all of Respondent's contentions with respect to supervisory status, I find that it has fallen short of meeting its burden that Negron was a supervisor under Section 2(11) of the Act. I shall therefore proceed to decide the complaint allegations with respect to Negron's suspension.

III. THE SUSPENSION OF NEGRON

A. FACTS

On January 23, the Union filed an RC petition in Case No. 2-RC-23250, seeking to represent a unit of porters and maintenance employees. On January 24, a Notice of Hearing was sent out by the Region, setting a hearing for February 1. On January 31, an Order Rescheduling Hearing was issued by the Region, setting a new date of February 11, for the start of the representation hearing.

About a week and a half prior to the hearing, Dina Chiclana and Juan Gutierrez representatives of the Union, met with several employees including Negron. They informed the employees that there was a representation hearing scheduled, and it may be necessary for some of the employees to testify. All of the employees present replied that they did not want to testify, because they were afraid of the Company. The Union officials told the employees that they would let the employees know about further developments.

Shortly thereafter, it became known to the Union that the supervisory status of Negron was going to be an issue at the hearing. Chiclana than telephoned Negron and asked him if he would be willing to testify at the hearing. Negron replied that he did not want to be bothered, and that he was afraid of being dismissed by the Company. Negron also told Chiclana if he had to come to the hearing that he needed to get permission from the Company to leave work and to notify the Company that he was going to be out.

Subsequent to that conversation, Chiclana informed the Union's lawyer, Larry Cole, of his unsuccessful efforts to persuade Negron to testify at the hearing. They discussed issuing a subpoena to Negron, and Cole finally decided to wait and see how the testimony goes at the hearing. If at the hearing, it was concluded that Negron's testimony was essential, the Union would subpoena him at that time.

On Friday, February 8 at about 1:30 p.m., Negron informed Ramos that he was ill and was going to go to the emergency room. Ramos said to Negron that that was fine, but he should bring Ramos a note from the hospital when he returned to work.

At about 4:00 p.m., Negron telephoned Ramos. According to Negron, he informed Ramos that he was diagnosed with pneumonia and the doctor had ordered three days rest. Ramos denied Negron's testimony in this regard and asserts that Negros merely informed her that he was still at the hospital and waiting to be treated.

On Monday, February 11, Negron testified that in accordance with Ramos' request for a doctor's note, he asked Liz Zulma, a porter, to deliver his discharge papers

from the hospital to Ramos, because Negron did not want to go outside in the cold to Ramos' office.[6]

At around 9:00 a.m. Ramos called Negron and asked him to respond to an elevator emergency. Negron agreed and took care of the problem. When Negron returned to Ramos' office at about 9:30 a.m., Ramos asked him to perform the oil readings. Negron replied that he was not feeling well and he needed to go to the pharmacy to fill a prescription. Ramos asked Negron to do the oil readings first. Negron agreed to do so.

While Negron was performing the oil readings, Ramos received a tenant complaint that the tenant had no hot water in her apartment. According to Ramos, Negron repeated to her that he was going to the pharmacy. She did not tell him about the tenant complaint about no heat and did not ask him to deal with that problem. Negron asserts that he told Ramos that he was going to go home and go to bed because he was sick.

At some point later in the morning, Negron went to the pharmacy. While there, he received a call from his son's school, informing him that his son had an asthma attack, and he needed to come to the school and pick his son up. Negron testified that he tried to call the office to notify Ramos, but no one answered the phone. He then tried Ramos on her cell and asserted that he left her a message that he had a family emergency and was leaving the premises.[7]

While still at the pharmacy, Negron received another call on his cell phone, this one from Chiclana. She informed Negron that there was a hearing going on at the Labor Board, the Union needed him to testify, and they had a subpoena there for him. Negron replied that he didn't receive a subpoena, Chiclana answer that it didn't matter, the Union will serve him with the subpoena when he arrives. Negron told Chiclana that he didn't feel well, and he was in the middle of an emergency with his son. She informed him that he was being subpoenaed and he must be at the hearing. Negron replied that if he is subpoenaed, he will come, but can't "go now" because of his family emergency. Negron testified that he did not attempt to notify Ramos about the subpoena, because he had already left a message on Ramos' machine that he was leaving the premises because of a family emergency, and therefore Respondent knew that he was going to be off the premises. Negron then left the pharmacy, picked up his son at the school, brought his son home, and proceeded to the hearing.

Meanwhile, back at Respondent's premises, Ramos asserts that she made several calls to Negron's cell phone between 10:30 and 11:00 a.m., and left a message

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[6] The documents that Negron gave to Zulma reflected that Negron was treated at the emergency room at Mt. Sinai Hospital and that he had a chest X-ray. These documents did not contain a diagnosis, nor a statement that Negron needed bed rest for three days. Ramos asserts that she did not receive those documents from Zulma until February 13, wherein Zulma told Ramos that she (Zulma) had forgotten to give them to Ramos.

[7] Ramos denied that she ever received such a message.

for him to call her. At 11:00 am Ramos went to Negron's apartment to try to find him. Negron's wife informed Ramos that Negron had been called for a family emergency and had to leave. Ramos instructed Negron's wife that if she heard from Negron to let her know that Ramos was looking for him.

Sometime during the morning, Ramos sent an email to Hanna, stating that she was looking for Negron and couldn't find him.[8] After receiving several more complaints from tenants about no heat, Ramos called a contractor at about 1:00 p.m. to come and check the boiler.

Meanwhile, at the representation hearing, Hanna testified on behalf of Respondent. After hearing such testimony, the Union attorney concluded that it would be necessary for Negron to testify on behalf of the Union. He instructed Chiclana to call Negron and inform him that the Union had a subpoena for him, and he must come to the hearing to testify.

As detailed above, both Chiclana and Gutierrez made phone calls to Negron concerning his coming to testify.[9]

At about 1:15 p.m. Negron arrived at the hearing. Respondent's attorney, when he saw Negron arrive, said that he wasn't aware of Negron being a witness. The Union attorney stated that the Union had a subpoena for Negron, and "here it is." The Union's attorney showed the subpoena to Respondent's attorney. The subpoena was not served or given to Negron. According to Negron, when he arrived, "they stated that it wasn't necessary to give it (the subpoena) to me in writing by hand." [10]

At the first break after Negron arrived, Hanna telephoned Ramos. Hanna asked Ramos if she knew where Negron was, and if she had given him permission to leave work. Ramos responded that Negron had told her that he was going to the pharmacy, and had not returned. She added that she had gone to Negron's apartment to look for him, and was told by Negron's wife that Negron left the premises to tend to a family emergency. Hanna told Ramos to stop looking for Negron, because Hanna knew where Negron was. Ramos did not inform Hanna about the complaints that had been received concerning the heat, or that she had called a contractor to check out the boiler.

Negron testified for the remainder of the afternoon, concerning his supervisory status. Hanna testified that he believed that some of the testimony given by Negron in that regard was untruthful.

After Negron concluded his testimony, Gutierrez spoke to Hanna. Gutierrez said

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[8] Ramos did not know that Hanna was attending a hearing. Hanna did not receive Ramos' email, since the reception at the Labor Board was poor.

[9] Gutierrez, upon Chiclana's instructions also called Negron to see where he was. Negron told Gutierrez that he was on his way.

[10] Negron did not testify who it was who stated that it wasn't necessary to physically give him the subpoena.

to Hanna, "I'm surprised to see Mr. Negron here today." Hanna asked why and Gutierrez responded "last week he wasn't going to come, but all of a sudden he just showed up. So I was surprised by it."[11]

Based on this remark by Gutierrez, Hanna testified that he believed that Negron knew about the date of the hearing by Friday, February 8, that he knew that he was going to attend, and that he had failed to ask permission from Respondent to attend the hearing.

After the hearing on February 11, Negron returned to his apartment, since he was still sick. No one from Respondent requested that he check the boiler or otherwise attend to the lack of heat. The contractor arrived at 3:00 p.m., and the boiler was not fixed until 11 p.m.

On the evening of February 11, Hanna spoke to Sprayregen on the phone. Hanna told Sprayregen that Negron had testified at the hearing, and that neither he nor Ramos knew about it, or gave Negron permission to leave the premises. Hanna also informed Sprayregen that he believed that Negron knew that he was supposed to be at the hearing, and falsified what he told Ramos. Hanna recounted that the Union had told him that he (the Union Rep.) was surprised to see Negron there, since last week he (Negron) had told the Union that he didn't want to come to the hearing. Hanna also told Sprayregen that Negron had been served with a subpoena at the time of the hearing, and the Union's attorney had a subpoena for him to come down to the hearing. Sprayregen replied that Respondent still needed to be notified about where Negron was going to be.

Hanna also said to Sprayregen that he felt that some of Negron's testimony at the trial had not been truthful. Sprayregen asked Hanna if anything happened between Hanna and Negron, and if Hanna knew why last week, Negron didn't want to go to the hearing, but now he was there. Hanna responded that he had no idea, but the minute the Union started organizing, Negron's attitude changed toward the Company. Hanna recounted specifically how in his view, Negron's attitude had changed. Hanna stated that Negron had began to talk to Hanna in an "aggressive" and "belligerent" tone, and that Negron would not respond promptly to his calls wherein Negron had always immediately responded to Hanna's calls, prior thereto.

After further discussion, it was decided that Hanna would speak to Negron in the morning, and see if he had a legitimate explanation for leaving the premises without informing anyone from Respondent and without permission. If not, it was decided that Negron would be suspended.

On Tuesday, February 12, Hanna spoke to Negron by phone. Hanna began the

[11] While Gutierrez denied having this conversation with Hanna, I credit Hanna. It is not likely in my judgment, that Hanna would make up such a comment. Rather Hanna's testimony is supported by Gutierrez's admission that he was aware that prior to the hearing, Negron had told Chiclana that he would not testify.

conversation by asking Negron why he had left the premises yesterday without Hanna's permission. Hanna also asked why Negron did not tell Respondent that he had to go to the hearing.

Negron replied that he was out sick, so why would he need to ask permission. Hanna responded that Negron was still required to call and notify Respondent where he was going. Negron then told Hanna that he was under subpoena to come to the hearing. Hanna stated that Negron had told Ramos that he was going to the pharmacy, but he did not tell Ramos that he was going elsewhere. Negron again mentioned that he was subpoenaed, and added that he did not know until the day of the hearing that he had to attend. Hanna answered that his understanding from one of the Union representatives, was that Negron knew "about the hearing last week, and you weren't going to come and then showed up by surprise." Negron insisted that he did not know the date of the hearing or that he was coming, until he was told about the subpoena on the same day of the hearing. Hanna responded that he didn't care whether Negron was subpoenaed or not, but that Negron was still supposed to notify either him or Ramos that he was leaving the premises and where he was going. Negron then responded that since he was subpoenaed, he didn't have to notify Respondent. Hanna replied that that's not true, that Respondent had tenants to service, and he was violating company policy, by leaving his post without notification.

Negron also informed Hanna that he had looked for Ramos, but couldn't find her. Negron also told Hanna that he had an emergency and had to pick up his son. Hanna responded to that by again emphasizing that he needed to notify Respondent where he was going. Negron repeated that he could not find Ramos. Hanna said that Negron could have left a note under Ramos' door. Negron replied that he didn't think about that, and that "they told me that I had to come right away, so I just left."

Finally, Hanna testified that he concluded that Hanna had not provided an adequate explanation for his conduct on February 11, so he informed Negron that he was suspended without pay for five days.

According to Hanna, Respondent decided to suspend Negron for "two reasons. (1) Not telling us in advance that he had to go somewhere and not ask permission to leave; and (2) for telling the property manager that he was going somewhere where in reality he went elsewhere."

Respondent prepared a letter detailing the suspension, and the reasons therefore, dated February 13. It reads as follows:

> February 13, 2008
> Mr. Fernando Negron
> 926 Bronx Park South #BC
> Bronx, NY 10460
>
> Dear Mr. Negron:
>
> This letter shall serve to notify you that you are suspended for leaving

your post without notifying anyone on February 11, 2008. You told Ms. Ramos that you had to go to the pharmacy and you never returned. When Ms. Ramos tried to learn your whereabouts, she could not get in touch with you.

As the superintendent and member of management that oversees the staff for Rising Development, I expect you to be responsible about all aspects of your job. The Company must be able to trust you with the responsibilities of overseeing the well-being of five (5) buildings. This trust is eroded away when you fail to live up to your responsibilities. In addition, you should confer with both me and Ms. Ramos about any time off you need from your regular schedule.

You are hereby suspended for one (1) week from Tuesday, February 12, 2008 through February 18, 2008 without pay. Future violations may result in further discipline being taken against you.

Very truly yours

Hanna Hanna

On Thursday, February 14, Hanna decided to shorten the suspension to three days, because he felt that Respondent needed to have a superintendent on the premises, and that he believed that "the message was delivered."

Further, Negron conceded that he was aware of the Company policy to notify Respondent if he was going to be off the premises, but he testified that he did not attempt to notify Ramos that he was going to the hearing, because he had already attempted to call Ramos and left a message on her machine that he was going to be off the premises due to an emergency, and he was then told about the subpoena. Therefore he didn't feel the need to call again to tell Ramos and leave another message, telling her that he would be off the premises.

Respondent also introduced into evidence a copy of an Employee Handbook. According to Hanna, Negron violated two sections of the Handbook. They are the provisions dealing with absenteeism and tardiness, and fraud, dishonest and false statements. The manual reads as follows:

SECTION III – EMPLOYEE CONDUCT

3.1 Code of Conduct

As an integral member of Rising Development team, you are expected to accept certain responsibilities, adhere to acceptable business principles in matters of personal conduct, and exhibit a high degree of personal integrity at all times. This not only involves sincere respect for the rights and feelings of other but also demands that both in your business and in your personal life you refrain from any behavior that might be harmful to you, your coworkers, and/or Rising Development, or that might be viewed unfavorably by current or potential clients or by the public at

large.

Whether you are on or off duty, your conduct reflects on Rising Development. You are consequently, encouraged to observe the highest standards of professionalism at all times.

Listed below are some of the rules and regulations of the Company. This list should not be viewed as being all-inclusive. Types of behavior and conduct that Rising Development considers inappropriate and which could lead to disciplinary action up to and including termination of employment without prior warning, at the sole discretion of the Company, include, but are not limited to, the following:

> **Absenteeism and Tardiness** It is difficult for us to properly serve our clients and meet deadlines when an employee does not report to work as scheduled. It also creates an unnecessary and unfair burden on fellow employees. Therefore, we cannot tolerate absenteeism or tardiness.
>
> **Fraud, Dishonesty and False Statement** Falsification of any application, medical history record, time record or any other document is strictly prohibited. If you observe any of these violations or become aware of any other conduct of a questionable nature, it is your responsibility as an employee of this Company to report it directly to your supervisor immediately**.**

Hanna did not explain how Negron's conduct violated the provision with respect to absenteeism and tardiness. He did testify that Negron allegedly violated the false statement provision. Hanna asserts that Negron made a false statement to Respondent by telling Respondent that he had to go to the pharmacy and not showing up at work, "when in reality he went elsewhere."

B. ANALYSIS

While most complaint allegations contending that Employers violated Section 8(a) (3) and (4) of the Act must be evaluated under *Wright Line* standards 251 NLRB 1083, 1089 (1980) enf'd 662 F. 2d 884 (1st Cir. 1981), cert. denied 455 U.S. 484 (1982), such analysis is not appropriate, as here, where discriminatory motivation is not determinative.

Rather, this case is controlled by *Walt Disney World Co*., 216 NLRB 836 (1975), where the Board considered the issue of an employer disciplining of employees who had been subpoenaed to testify at a Board hearing, but who had violated established company rules concerning leaving work. The Board observed as follows:

> A respondent employer's "obligation, with respect to subpoenaed employee witnesses, is one of noninterference, nonrestraint,

> and noncoercion as to such employees' right and obligation to attend scheduled hearings as subpoenaed witnesses, and one of nonreprisal to such employees because they are subpoenaed witnesses."
>
> * * * *
>
> Respondent contends that it disciplined Davis and Winkler not because of their attendance at the NLRB hearing or for responding to an NLRB subpoena, but because they violated established and recognized company rules concerning the proper procedures for seeking an authorized leave of absence. But Respondent's rules of procedure cannot limit or restrict an individual's obligation to respond to a Board subpoena.
>
> * * * *
>
> Accordingly, we find that the above-described conduct of Respondent interfered with the right of employees to participate in proceedings before the Board and that it tended to impede the Board in the exercise of its power to compel the attendance of witnesses at its proceedings and to obstruct the Board in its investigation. As this conduct had the tendency to deprive the employees of vindication by the Board of their statutory rights, it violated Section 8(a) (1) of the Act. Moreover, as Respondent's disciplinary action against Winkler and Davis tended to restrain them and other employees from participating in Board proceedings, we find that by such conduct Respondent also violated Section 8(a) (4) of the Act. Id at 837-839. Footnote omitted.

Walt Disney, supra, has been consistently followed by the Board, and applied in various contexts. *Exelon Generation, LLC,* 347 NLRB 815, 824 (2006) (Requiring union subpoenaed employees to take vacation leave or floating holidays to attend board hearings.) *Fitel/Lucent Technologies*, 326 NLRB 46, 54-44 (1998) (Compelling employees who had been subpoenaed to exchange shifts with another employee, in order to attend hearing, although Employer applied its existing policy to employees regarding time off from work); *Yenkin Majestic Paint Corp*., 321 NLRB 387 (1996) (Written reprimand of employee for attending Board proceeding, without following Company procedures concerning permission to leave work); *Southern Foods, Inc.,* 289 NLRB 152, 154-156 (1988) (Employees discharged for failing to obtain permission to leave premises and for failing to give prior notice of inability to be at work, in order to attend hearing); *U.S. Precision Wires*, 288 NLRB 505, 506 (1988) (Treating subpoenaed employee's days of attendance at hearing as absences in Employer's "excellent attendance" program); *Vokas Provision Co., d/b/a The Rich Plan of Western Reserve*, 271 NLRB 1010, 1011 (1985); enf. denied 796 F.2d 864 (6th Cir.) (Discharging six employees for leaving work, without permission to attend Board hearing*); Western Clinical Laboratory*, 325 NLRB 725, 726 (1976) enfd. 571 F. 2d 457, 460 (4th Cir. 1978), (Requiring employee to use vacation time for attendance at Board hearing).

As all of these cases make clear, it is not necessary to demonstrate that the Employer intended to discriminate against an employee for appearing at a Board proceeding. Rather, the Board concludes, that even where the Employer applies its existing policies and rules in a non discriminatory fashion to such employees, the Act has been violated, since such conduct inherently interferes with the Board's processes. As the Board observed in *Western Clinical Laboratory*, supra.

> While we agree with the Administrative Law Judge that the evidence here does not show that Respondent's charging Cupler with vacation time for the period he spent at the Board hearing, under subpoena, was in reprisal for his having testified at the hearing, or was calculated to discourage him from participating in a Board hearing, nevertheless we believe that Respondent's actions so interfered with Cupler's rights, and with the Board's processes, that such actions are violative of Section 8(a) (3), and (4), and (1) of the Act.
>
> In order for the Board to fulfill its obligation to adequately administer the Act, it is necessary that its processes not be unjustifiably fettered by anything that precludes parties from participating in such processes free from coercion or restraint. In our opinion forcing an employee who attends a Board hearing as a witness under subpoena to use his accrued vacation time, when he would prefer to take leave without pay, amounts to such restraint regardless of the motive behind such action.

Based upon *Walt Disney* and its progeny as detailed above, Respondent's suspension of Negron must be found to have violated the Act.

According to its own witness, as well as the written document setting forth the reasons for the suspension, Negron was suspended because he failed to request permission from Respondent to leave the premises, failed to notify the Respondent that he was at the hearing and for lying about where he was going. Since all of these alleged transgressions directly relate to Negron's attendance at the hearing, Respondent's conduct is violative of the Act, even absent a finding of discriminatory motivation. *Walt Disney,* supra; *Southern Foods*, supra. (Discharge for failing to obtain permission and for failing to give prior notice of inability to be at work.)[12]

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[12] I note that in *Yenkin Majestic Paint*, supra, where the Board found a violation of the Act where the Employer reprimanded an employee for leaving work without permission, Member Cohen, in a footnote observed in his concurrence that in his view, a subpoenaed employee has an obligation to notify the employer that he will be absent from work because of the subpoena. While I tend to support Member Cohen's view that it is not Board law. See *Southern Foods*, supra at 155. Nonetheless, here Respondent has violated the Act, even under Member Cohen's view, since it suspended Negron for not receiving permission to attend the hearing, as well as for not notifying Respondent. See *St. Barnabas Hospital* 334 NLRB 1000, 1015 (2001)

Continued

Furthermore, I agree with General Counsel, that Respondent cannot justify the discharge on the grounds that Negron "lied" about where he was going. Even if it found that Negron did "lie" in connection with his attending the hearing, this would not be a valid defense, since such conduct in the course of engaging in protected concerted activity is not so opprobrious to render the concerted activity unprotected. *Earle Industries*, 315 NLRB 310, 314-315 (1994), enf. 400 (8th Cir. 1996).

Moreover, I find that it cannot be reasonably concluded that Negron "lied" about where he was going. While Negron admittedly failed to call and/or in any other manner notify Respondent that he had been subpoenaed and needed to attend the hearing, he did not lie about his activities. He had already notified Respondent that he was leaving the premises to take care of an emergency, and he reasonably believed that he had fulfilled his obligation to notify his employer that he would be off the premises. He may have also believed that since he had been told about the subpoena, that he need not notify Respondent of his intention to attend the hearing. Either way he did not lie to Respondent.

Respondent and Hanna's reliance on the comments of Gutierrez to Hanna at the hearing are misplaced. Gutierrez told Hanna that he was surprised to see Negron at the hearing, since last week Negron had told the Union that he did not intend to appear. Respondent argues that this comment proves that Negron knew that he would be attending the hearing at least by Friday, February 8, and that he therefore lied when he told Respondent that he was going to the pharmacy on February 11.

I find Respondent and Hanna's position illogical and without merit. In fact, in my view, Gutierrez's statement to Hanna, corroborates Negron that he did not know that he was going to attend the hearing, until he received a call from the Union on February 11, telling him that he must attend the hearing because the Union had a subpoena for him. There is nothing in Gutierrez's comments that indicates or even suggests that Negron intended to come to the hearing, prior to the February 11 call from the Union. Moreover, Respondent was clearly aware of Negron's position in this regard prior to Hanna suspending him. Therefore, I conclude that Negron did not lie to Respondent about his intentions to go to the hearing and even if he did, it would not be a legitimate justification for Respondent to suspend him.

I am cognizant of the fact that *Walt Disney,* supra, and most of the other cases cited, stress the fact that the employees involved were subpoenaed to testify, in justifying the Board's prohibition in Employer's interfering with the subpoenas by enforcing their nondiscriminatory policies. I also realize that here, Negron was not technically serviced with a subpoena, since he did not actually receive it. However, this fact is inconsequential based on all the circumstances herein. I find that here all parties, including Respondent believed that Negron had been subpoenaed, notwithstanding the fact that Negron was not given the subpoena. Negron was told by the Union that there

(where two reasons for discharge are given by Employer, one lawful and one unlawful, Employer must establish that it would have discharged employees based on lawful ground).

was a subpoena for him at the hearing and that fact was what motivated Negron to change his mind, and to attend the hearing and testify. Thus Negron reasonably believed that he was legally bound to appear at the hearing. *Rich Plan of Western Reserve,* supra. Here this conclusion is more compelling, since not only did Negron reasonably believe that the subpoena was enforceable, but Respondent did as well. Thus, when Negron appeared at the hearing, the Union's attorney stated that it had a subpoena for Negron and "here it is," and showed it to Respondent's attorney. While for some unexplained reason, the Union's attorney did not give the subpoena to Negron, I find this omission insignificant.

Both Respondent and Negron believed that Negron was required to attend the hearing based on the subpoena that Hanna saw. Indeed, when Hanna discussed the incident with Sprayregen, Hanna informed Sprayregen that Negron had been "served" with the subpoena at the hearing, and that the Union's attorney had a subpoena for him to come to the hearing.

I conclude therefore that Negron must be treated as a subpoenaed witness, and that under *Walt Disney*, supra, and its progeny his suspension was violative of the Act.

I do recognize that *Rich Plan*, supra was reversed by the Court of Appeals, based primarily on the lack of proper service of the subpoenas. However, I am bound by Board law, and *Rich Plan* supra has not been reversed or modified by the Board in any subsequent cases. Further, I find that the facts in *Rich Plan,* supra are sufficiently distinguishable, so that even under the courts view of the law, that Respondent's conduct here was still violative of the Act.

The facts in *Rich Plan supra,* reflected that six employees had requested that they be permitted to attend a representation hearing, and informed the company that there were subpoenas waiting for them at the hearing. The employer's president informed the employees that they would not be permitted to leave work unless they had a subpoena, but he would allow the employees to choose one representative to attend the hearing. He told them that he would not allow production to be stopped and if the other employees left work they would be discharged.

The employees refused the employer's offer, and all of them left work to attend the hearing. The employer then immediately collected their timecards and discharged them.

When the employees arrived at the hearing, they were given the subpoenas. No hearing was held, because charges were filed. The ALJ found based on these facts that no violation was established. The ALJ emphasized the employer's willingness to release all subpoenaed employees, but noted that the subpoenas were not served until after they left work and had been discharged. The ALJ added that there was no apparent need for the employees to testify, since there was apparent agreement as to the unit description.

The Board as noted disagreed with the ALJ and found that the employees reasonable belief that they were legally bound to obey the subpoena was sufficient, to

bring the employees within the protection of Section 8(a)(4) of the Act.

The Court disagreed with the Board and agreed with the ALJ's findings and conclusions. The Court applied the balancing test applied by the ALJ and by the Board in their cases where no subpoenas are served[13] and concluded that no violation of the Act has been established.

In making its conclusions, the Court emphasized as did the ALJ in *Rich Plan*, that at the time of the discharge there was no service of the subpoenas. As the ALJ had noted, the employees were terminated *before* they arrived at the hearing, and *before* they were given the subpoenas. Here however, Negron was not suspended until after he and Respondent were shown the subpoena at the hearing. As noted above, Respondent believed that Negron had been served with the subpoena, by virtue of these facts, and nonetheless suspended him. In contrast, in *Rich Plan,* supra, the Employer had specifically told employees that if they had a subpoena they could attend the hearing, thereby recognizing that if they had been subpoenaed, it could not deny them permission to attend. Respondent on the other hand, disciplined Negron, even though it believed that he had been served with a subpoena, because it believed (erroneously), that whether or not he was served with a subpoena, Negron could not attend the hearing unless he received permission from Respondent and notified Respondent of his intention to comply with the subpoena.

Further the Court in *Rich Plan* found in agreement with the ALJ that the attendance of the six employees at the hearing was not necessary. That finding cannot be made here, since the presence and testimony of Negron was essential to the union's case. Negron's status was in issue and it was clearly essential that he testify to refute or explain testimony previously given by Hanna. *Cf. Ohmite Mfg. Co.,* 290 NLRB 1036, 1038 (1988) (Board in applying balancing test to unsubpoenaed employees, found that employer did not unlawfully threaten employee with unexcused absences if she left work to attend hearing, and emphasized that her testimony was not needed.)

Therefore, I find that even under the Court's analysis in *Rich Plan*, Respondent would still be found to have violated the Act.

My primary finding however, as detailed above that under *Rich Plan's* Board decision, which I am bound, Negron is in effect considered to have been served with a subpoena, and the principles of *Walt Disney* and its progeny supra apply.

Accordingly, based on these principles and authority, I conclude that Respondent has violated Section 8(a)(1) and (4) of the Act by suspending Negron.[14]

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[13] *Standard Packaging Co.,* 140 NLRB 628, 630 (1963).

[14] While the complaint also alleges this conduct to be violative of Section 8(a)(3) of the Act, I find it unnecessary to so decide, since the remedy would not be substantially different. *Walt Disney,* supra at 834, fn. 11; *U.S. Precision,* supra at 505 fn. 3; *Rich Plan,* supra at 1011, fn.5.

Having so found, I find it unnecessary to examine General Counsel's alternative theories that Respondent's conduct is violative of the Act under a *Wright Line* analysis, or under the principles of *Felix Industries,* 331 NLRB 144, 1466 (2002), enf. denied and remanded 251 F.3d 1051 (D.C. Cir. 2001), on remand *Felix Industries Inc.,* 339 NLRB 145 (2003).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending Fernando Negron because he appeared and testified at an NLRB hearing, Respondent has violated Section 8(a)(1) and (4) of the Act.

4. The unfair labor practices engaged in by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged certain unfair labor practices, I find that they must be ordered to cease and desist thereform and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent make Fernando Negron whole for the discrimination against him, plus interest, as computed in *F.W. Woolworth*, 90 NLRB 289 (1950) and *Horizons for the Retarded,* 283 NLRB 1173 (1980).

The request of General Counsel to change the Board's method of calculating interest to a compounded quarterly basis is denied. *Dietrich Industries,* 353 NLRB No. 7 fn. 5 (2008); *Rogers Corp.*, 344 NLRB 504 (2005).

Based upon the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Rising Development BPS, LLC, the Bronx, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Suspending or otherwise disciplining its employees because the employees attended or testified at an NLRB proceeding.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section (7) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Fernando Negron whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's order, remove from its files any reference to the unlawful suspension of Negron, and within 3 days thereafter notify Negron in writing that this has been done and that the suspension will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Bronx, New York locations, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 12, 2008.

Dated, Washington, D.C., March 13, 2009

_____
Steven Fish
Administrative Law Judge

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT suspend or otherwise discipline our employees because our employees attend or testify at an NLRB proceeding.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole Fernando Negron for the discrimination against him, plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension of Fernando Negron and within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against in any way.

RISING DEVELOPMENT, BPS, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.